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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NORTHEAST BANCORP, INC., UNION TRUST COMPANY and CITICORP,
Petitioners,

—against—

THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,
Respondent,

—and—

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF INTERVENOR-RESPONDENTS CBT CORPORATION, BANK OF NEW ENGLAND CORPORATION AND HARTFORD NATIONAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Congress enacted Section 3(d) of the Bank Holding Company Act of 1956 (commonly known as the "Douglas Amendment") it imposed a federal prohibition against interstate bank acquisitions by out-of-state bank holding companies, and at the same time authorized the states, if they wished, to lift this federal bar—as Senator Douglas stated—"to the degree" that they deemed desirable. In the words of a co-sponsor of the Douglas Amendment, Congress thereby deemed interstate bank acquisitions to be "a matter of primary concern to state governments" and "an area best left to their discretion."

In 1982, Massachusetts enacted a statute pursuant to the Douglas Amendment which permits an out-of-state bank holding company located in any New England state to acquire a bank located in Massachusetts if the acquiror's home state has adopted reciprocal legislation permitting bank acquisitions by Massachusetts bank holding companies. In 1983, Connecticut enacted a similar statute. Thereafter, the Board of Governors of the Federal Reserve System approved, over petitioners' constitutional objections, three applications concerning interstate transactions involving Massachusetts and Connecticut banking organizations. The Second Circuit, in affirming the Board's approval orders, rejected petitioners' constitutional challenges to the Massachusetts and Connecticut Acts.

The issue in this case is *not*—as petitioners claim—whether Congress intended to permit the states to "balkanize" the nation's banking system. Congress itself, by enacting the Douglas Amendment over 28 years ago, effectively partitioned the nation's banking system along state lines. Rather, the questions presented in this case are:

1. Whether state legislation may be challenged based upon purported discrimination against interstate commerce, encroachment upon federal supremacy and "balkanization" of the nation's banking system where Congress, in the Douglas Amendment, prohibited *all* interstate bank acquisitions and, in

order to render state policy determinations paramount, authorized the states to determine for themselves whether and to what degree to permit such acquisitions?

2. Whether the Massachusetts and Connecticut Acts impermissibly restrain interstate commerce where Congress, in the Douglas Amendment, authorized the states to be selective in determining which out-of-state bank holding companies may acquire in-state banks?

3. Whether the Massachusetts and Connecticut Acts improperly encroach upon federal supremacy in violation of the Compact Clause where Congress, in the Douglas Amendment, chose to defer to potentially disparate state policy determinations in the area of interstate bank acquisitions?

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Respondents CBT Corporation, Bank of New England Corporation and Hartford National Corporation, all of which were intervenors in the court below, submit this brief in opposition to the petition for certiorari filed by Northeast

Bancorp, Inc., Union Trust Company and Citicorp (collectively, "petitioners") in this matter.[1]

STATEMENT OF THE CASE

a. *The Federal Statutory Context.* One of Congress' central purposes in enacting the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* (the "BHC Act"), was to regulate the interstate expansion of bank holding companies.[2] In confronting this problem, Congress considered three alternative approaches, including that which was ultimately enacted as Section 3(d) of the BHC Act—commonly referred to as the "Douglas Amendment," after its sponsor Senator Paul Douglas of Illinois.

The House of Representatives passed a version of the BHC Act, H.R. 6227, that contained an absolute prohibition on interstate bank acquisitions by bank holding companies, prompted by the concerns of many Representatives about big business and their desire that banking remain a community-oriented industry consisting of localized "democratic grass-roots institution[s]."[3] This concern was not shared by a majority of the Senate Committee on Banking and Currency; it reported out a bill that permitted interstate bank acquisitions, subject only to approval by the Federal Reserve Board.[4] When

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1 A statement concerning the parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of CBT Corporation, Bank of New England Corporation and Hartford National Corporation appears in the Appendix to this brief.

2 By 1956, a number of holding companies had already established large interstate networks by acquiring banks located outside their home states. *E.g.*, H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-5, 15 (1955); 102 Cong. Rec. 6858 (1956) (remarks of Senator Douglas).

3 H.R. Rep. No. 609, 84th Cong., 1st Sess. 1-2, 5-7 (1955); *accord* 101 Cong. Rec. 4407 (Remarks of Rep. Wier), 3823 (Speech of Rep. Rayburn submitted for the Record by Rep. Spence), 8028-29 (Remarks of Rep. Patman), 8030-31 (Remarks of Rep. Rains), 8033 (Remarks of Rep. O'Hara), 8034 (Remarks of Rep. Marshall) (1955).

4 S. Rep. No. 1095, Pt. 1, 84th Cong., 1st Sess. 10-11 (1955). The Board of Governors of the Federal Reserve System is referred to herein as the "Federal Reserve Board" or the "Board."

that bill reached the Senate floor, its proponents argued that it was preferable to the House bill which, because it totally prohibited interstate banking, was said to represent "an unwarranted interference with States' rights."[5]

The dispute was resolved by Senator Douglas' compromise. The Douglas Amendment prohibits the Federal Reserve Board from approving the acquisition by a bank holding company located in one state of a bank located in another state unless such acquisition is "specifically authorized by the statute laws of the state in which such bank is located by language to that effect and not merely by implication."[6] As this Court has observed, the Douglas Amendment "establishes a general federal prohibition on the acquisition" of in-state banks by out-of-state bank holding companies. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). The Douglas Amendment also authorizes the states "to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited." *Id.* (emphasis in original). Thus, Congress in the Douglas Amendment empowered the states to lift the federal prohibition on interstate bank acquisitions to the extent that they desired to do so.[7]

b. *Subsequent Developments.* At the time of passage of the BHC Act and for many years thereafter, no state permitted its banks to be acquired by out-of-state bank holding companies. The practical effect of the Douglas Amendment thus was to divide the nation into separate banking regions defined by state boundaries. During the last 15 years, however, many large banking institutions have established an interstate presence through various means that avoid the constraints imposed upon banking activities by the Douglas Amendment and other

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5 102 Cong. Rec. 6752 (1956) (remarks of Senator Robertson, floor manager for the Senate Committee's bill, *quoting* Senator Maybank).

6 12 U.S.C. § 1842(d)(1).

7 A further discussion of the legislative history of the Douglas Amendment appears at pp. 11-14, *infra*.

federal and state statutes.[8] Many large bank holding companies now serve commercial customers nationwide through out-of-state offices that offer commercial financing, leasing, factoring, cash management and international banking services. Many large bank holding companies also pursue retail banking business across state lines through ownership of consumer finance companies, as well as the use of credit cards, mail solicitation of deposits and interstate networks of automatic teller machines.[9] Petitioner Citicorp has been on the cutting edge of these changes through its establishment of interstate credit card and other special purpose banks, its acquisition of large savings and loan institutions in California, Illinois and Florida, and a number of other programs.

As *de facto* interstate banking has developed, within the last decade a total of 22 states have moved toward *de jure* interstate banking by enacting laws that create a variety of exceptions to the Douglas Amendment's prohibition of interstate bank acquisitions. Only one of these states—Maine—permits virtually unlimited entry by out-of-state bank holding companies.[10] Other states have partially lifted the federal bar in various ways. Alaska permits acquisitions of existing banks by out-of-state bank holding companies, but does not permit the acquisition of banks formed after a specified date.[11] New York

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8 Under the BHC Act, a "bank" is an institution that both makes commercial loans and accepts demand deposits. 12 U.S.C. § 1841(c) (1982). This Court has held that the Douglas Amendment's general prohibition applies only to interstate *bank* acquisitions, and not to the *non-bank* activities of bank holding companies. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 47.

9 On November 1, the Comptroller of the Currency approved applications by 13 bank holding companies, including petitioner Citicorp, to establish a total of 29 so-called "nonbank" or "consumer" banks. The American Banker, November 2, 1984, at 1. Because such institutions either do not make commercial loans or do not accept demand deposits, they arguably fall outside the definition of a "bank" contained in the BHC Act. See n.8, *supra*.

10 Me. Pub. Law 1983, ch. 302, § 2, as amended (1984).

11 Alaska Stat. § 06.05.235 (1982).

limits entry to bank holding companies whose home states permit acquisitions by New York holding companies.[12] Nine states, including Connecticut and Massachusetts, permit interstate bank acquisitions by banking institutions located within a particular region.[13] Three states limit acquisitions to "grandfathered" out-of-state holding companies which had acquired in-state banks prior to enactment of the BHC Act.[14] Six states limit entry by out-of-state bank holding companies to the establishment of special purpose banks which are prohibited from or restricted in competing with in-state banks.[15] Finally, two states—Oregon and Washington—permit out-of-state bank holding companies to acquire only "failing banks."[16]

c. *The Challenged Statutes.* The Massachusetts statute, enacted in December 1982, authorizes bank holding companies based in any of the other five New England states—Connecticut, Maine, New Hampshire, Rhode Island and Vermont—to acquire Massachusetts banking organizations, provided that the home state of the acquiror affords reciprocity to Massa-

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12 N.Y. Banking Law § 142-b (McKinney Supp. 1983).

13 In addition to Connecticut and Massachusetts, only one other New England state—Rhode Island—permits acquisitions by New England bank holding companies, although the New England-only feature of the Rhode Island statute expires after two years. R.I. Gen. Laws §§ 19-30-1, 19-30-2 (1983). Six other states have enacted regional reciprocal statutes which limit entry to out-of-state bank holding companies located in other areas. Fla. Stat. Ann. § 658.295 *et seq.*; Ga. Code § 7-1-620 *et seq.*; Act of February 3, 1984, ch. 287, *to be reported as* 1984 Ky. Rev. Stat. § 287-900 *et seq.*; N.C. Gen. Stat. § 53-209 *et seq.*; S.C. Laws tit. 34, ch. 24, 25; 1984 Utah Code Ann. 7-1-102, 7-1-702.

14 Fla. Stat. Ann. § 658.29 (West. Supp. 1983); Ill. Ann. Stat. ch. 17, § 2510 (Smith-Hurd 1981); Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

15 Del. Code Ann. tit. 5, § 801 *et seq.* (Supp. 1982); Md. Fin. Inst. Code Ann. § 5-903 (Supp. 1983); 1983 Nebraska Laws L.B. Nos. 454 and 58; Nev. Rev. Stat. ch. 666; S.D. Codified Laws § 51-16-41 (1983); Va. Code § 6.1-392 (1983). Also see p. 16 & nn.41 & 42, *infra*.

16 1983 Or. Laws ch. 367; 1983 Wash. Laws ch. 157. The Oregon statute limits acquisitions to holding companies from contiguous states.

chusetts banking organizations.[17] In June 1983, Connecticut passed a similar statute.[18]

Neither state permitted interstate bank acquisitions by bank holding companies prior to the passage of these laws. The challenged statutes thus operate to *permit* interstate commerce between Connecticut and Massachusetts, and potentially among as many as six New England states, where previously such commerce had been prohibited by the Douglas Amendment.

Neither the Massachusetts Act nor the Connecticut Act alters the Douglas Amendment's prohibition on interstate bank acquisitions by bank holding companies based outside New England. Such acquisitions continue to be barred not by *state* law, but rather by the federal prohibition contained in the Douglas Amendment.

d. *The Relevant Transactions and Board Proceedings.* After passage of the Connecticut and Massachusetts Acts, Bank of New England Corporation, based in Massachusetts, agreed to merge with CBT Corporation, a Connecticut bank holding company; Hartford National Corporation, another Connecticut bank holding company, agreed to acquire Arltru Bancorporation, a Massachusetts bank holding company; and Bank of Boston Corporation of Massachusetts agreed to acquire Connecticut-based Colonial Bancorp, Inc.

Applications for approval of these transactions were submitted to the Federal Reserve Board. In extensive comments in opposition to the applications,[19] petitioners did not deny that the Connecticut and Massachusetts Acts permitted interstate commerce that the Douglas Amendment otherwise would have

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17 Mass. Ann. Laws ch. 167A § 2 (West Supp. 1982) ("the Massachusetts Act") (Pet. App. A101-A102).

18 1983 Conn. Acts, Pub. Act No. 83-411 (Reg. Sess.) ("the Connecticut Act") (Pet. App. A99).

19 Petitioner Citicorp opposed all three applications. Petitioners Northeast Bancorp, Inc. and Union Trust Company did not oppose Hartford National Corporation's acquisition of Arltru Bancorporation or Bank of Boston Corporation's acquisition of Colonial Bancorp, Inc.

prohibited as a matter of federal law. Nonetheless, petitioners contended that the Massachusetts and Connecticut Acts violated the Commerce,[20] Compact,[21] Equal Protection and Due Process Clauses[22] of the Constitution.

The Board, in approving the transactions, concluded that the Connecticut and Massachusetts Acts provided the specific state statutory authorization required by the Douglas Amendment (Pet. App. A37, A74, A83), and found no adequate basis to declare the Acts unconstitutional (Pet. App. A38-A41, A49-A71, A74-A75, A83). Although the Board questioned whether the challenged statutes could be sustained under the Commerce Clause absent the authority conferred on the states in the Douglas Amendment (Pet. App. A55-A61), after a lengthy review of the language, history and prior interpretations of the Amendment (Pet. App. A61-A71), the Board concluded that "[n]othing in the history of the . . . Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry" (Pet. App. A71). The Board thus recognized that Congress in the Douglas Amendment authorized the states to pursue their own policies and to allow interstate bank acquisitions on a selective basis.

As for the Compact Clause, the Board viewed the challenged statutes as "part of an effort to create a regional banking zone," but it did *not* find that the New England states had entered into any actual agreement or confederation (Pet. App. A51-A52).[23] The Board recognized that, even if the statutes

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20 U.S. Const. art. I, § 8, cl. 3.

21 U.S. Const. art. I, § 10, cl. 3.

22 U.S. Const. amend. XIV, § 1.

23 Indeed, a "New England" agreement could not reasonably have been found in light of the widely divergent approaches to interstate bank acquisitions adopted by the six New England states. Only two other New England states permit interstate bank acquisitions: Maine permits virtually unlimited entry while Rhode Island has enacted a statute reciprocal with the Massachusetts and Connecticut statutes, the New England-only feature of which expires after two years. See nn. 10 & 13, *supra*. New Hampshire and Vermont have not enacted interstate bank acquisition statutes; there, the Douglas Amendment prohibits all interstate bank acquisitons.

were to be considered part of an "implicit" compact or agreement, they would violate the Compact Clause only if they "enhance[d] state powers *at the expense of federal supremacy*" (Pet. App. A52 (emphasis added)). The Board found, based on its detailed analysis of the Douglas Amendment's history and prior administrative and judicial construction (Pet. App. A65-A71), that the Amendment constitutes "*a renunciation of federal interest* in regulating the interstate acquisition of banks by bank holding companies" (Pet. App. A52 (emphasis added)). The Board therefore rejected petitioners' Compact Clause challenges.[24]

e. *The Decision Below.* Petitioners sought review of the Board's orders in the United States Court of Appeals for the Second Circuit. The Court of Appeals unanimously affirmed, rejecting all of petitioners' constitutional objections. (Pet. App. A21-A33).

The Second Circuit began its analysis with the Douglas Amendment. The Court of Appeals recognized that Senator Douglas had stated that the purpose of his amendment was to " 'permit out-of-State holding companies to acquire banks in other States only to the degree that State laws expressly permit them,' " and that " 'the amendment would leave the way open for States to make explicit provision for such purchases and acquisitions if they so decided' " (Pet. App. A28-A29, *quoting* 102 Cong. Rec. 6858, 6860 (1956)).

The Court of Appeals observed that under the Douglas Amendment, *no* out-of-state bank holding company could acquire a Massachusetts or Connecticut bank absent the challenged statutes. It concluded that because the Connecticut and Massachusetts Acts permitted interstate bank acquisitions that otherwise would be prohibited under federal law, the Acts

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24 The Board also concluded that the Massachusetts and Connecticut Acts—which "involve essentially economic legislation and do not raise issues of fundamental rights or draw upon suspect classifications"—were "rationally related to an attempt to maintain a banking system responsive to local needs in New England." (Pet. App. A54). The Board therefore found petitioners' Equal Protection argument to be without merit. (Pet. App. A55). The Board apparently found petitioners' claims under the Due Process Clause to be too insubstantial to require comment.

promote, rather than restrict, interstate commerce. (Pet. App. A29). The Second Circuit found no support whatsoever for petitioners' claims that Congress had intended to restrict the states' authority to lift in a selective manner the general federal prohibition on interstate bank acquisitions imposed by the Douglas Amendment (Pet. App. A29).

Having recognized that the Douglas Amendment had effected, with respect to banking, a profound departure from the notion of a single national economic unit, the Court of Appeals had no difficulty in disposing of petitioners' constitutional claims. The Second Circuit held that, while the ability of states to interfere with interstate commerce ordinarily is limited by the Commerce Clause, "if Congress authorizes the states to regulate some aspect of interstate commerce"—as Congress has clearly done in the Douglas Amendment—"any action taken by a state within that authority is 'invulnerable' to challenge" (Pet. App. A30-A31, *quoting Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652-53 (1981)). As for the Compact Clause, the Court of Appeals—like the Board—found no actual agreement or confederation of states. It concluded that, even if the Acts were "treated as a compact," there is no threat of encroachment upon "the just supremacy of the United States" that would violate the Compact Clause (Pet. App. A31-A32). In this regard, the Second Circuit noted the Board's conclusion that the Douglas Amendment constitutes "a 'renunciation of federal interest in regulating interstate acquisitions of banks by bank holding companies' " (Pet. App. A29).[25]

REASONS FOR DENYING THE WRIT

Petitioners claim that the Connecticut and Massachusetts Acts raise important issues of federal policy with respect to interstate banking (*e.g.*, Pet. 9-15). No doubt they do. However, the policy questions raised by petitioners relate to the desirability of disparate state approaches to interstate bank

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25 Finally, the Second Circuit, in rejecting petitioners' claims under the Equal Protection Clause, found the Acts to be rationally related to the legitimate interests of Massachusetts and Connecticut in fostering strong, locally-oriented banking institutions within those states. (Pet. App. at A33).

acquisitions (Pet. 11, 13, 14)—a matter that was resolved by Congress 28 years ago when it enacted the Douglas Amendment. In any event, the essential consideration here is not whether the Acts pose important *policy questions* for Congress, but whether the *legal issues* of statutory and constitutional interpretation raised by petitioners are sufficiently significant to warrant this Court's review. Those legal issues are anything but novel or unsettled. This matter presents a question of statutory interpretation regarding the Douglas Amendment as to which there is no conflict among the courts or between judicial and administrative precedents.

In the Douglas Amendment, Congress eliminated *all* interstate commerce in bank acquisitions as a matter of federal law. Thus, petitioners' repeated assertions to the contrary notwithstanding (*e.g.*, Pet. 9, 16), *Congress*—not the states—"balkanized" the nation for purposes of interstate banking. Congress also authorized the states to lift the federally-imposed barrier to interstate bank acquisitions, as stated by Senator Douglas himself, "to the degree" that they choose. The "expansion of bank holding companies across state lines" was considered—in the words of a co-sponsor of the Amendment—to be a "matter of primary concern to State governments" and "an area best left to their discretion" (see pp. 13, 14, *infra*).

That Congress intended in the Douglas Amendment to allow the states to exercise selectively the federally-granted power to lift the federal barrier to interstate bank acquisitions is supported by a long line of decisions of the Federal Reserve Board and the courts. Petitioners have pointed to no contrary precedents, nor do any exist.

Against the background of the Douglas Amendment, the illusory nature of petitioners' constitutional claims is apparent. Under this Court's established precedents, there is no violation of the Commerce Clause where, as in the Douglas Amendment, Congress has expressly authorized the states to regulate a particular aspect of interstate commerce. Nor is there any conceivable encroachment on federal supremacy in violation of the Compact Clause, where, as in the Douglas Amendment,

Congress has explicitly chosen to defer to state policies. In short, the decision below is wholly consistent with this Court's prior precedents under both the Commerce Clause and the Compact Clause.

Congress' power to regulate in an area of interstate concern by establishing state policy determinations as the norm, rather than the exception, is beyond dispute. Arguments that a different approach from that created under the Douglas Amendment would be preferable should be addressed to Congress, not the judiciary. Under the law as it presently exists, the *legal issues* sought to be raised by petitioners do *not* present questions of statutory or constitutional construction that call for review by this Court.

I. Congress In The Douglas Amendment Has Determined That The States Should Choose For Themselves Whether And To What Degree The Federal Bar To Interstate Bank Acquisitions Should Be Lifted.

Petitioners challenge the Massachusetts and Connecticut Acts as divisive state action that threatens to "balkanize" the nation's banking system and to enshrine inconsistent state policies. Petitioners' premise—that the national interest is best served by a single national banking unit and a "uniform approach to interstate banking" (Pet. 25)—is fundamentally at odds with the policy judgment made by Congress in the Douglas Amendment.

1. One of Congress' purposes in the Douglas Amendment was to establish a federal prohibition on interstate bank acquisitions, subject to a state's determination to lift the federal barrier.[26] Senator Douglas explained that, because no state then had enacted a statute authorizing interstate bank acquisitions, "the immediate practical effect" of his Amendment would be "to bar expansion of bank holding companies across state

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26 Because the Douglas Amendment was added to the BHC Act on the Senate floor, its legislative history consists entirely of floor discussion, principally by its chief sponsor, Senator Douglas of Illinois. A further discussion of that legislative history appears at pp. 2-3, *supra*.

lines," unless the states, in their discretion, chose to enact legislation to lift this bar.[27]

Thus, petitioners' complaint that the Massachusetts and Connecticut Acts raise the spectre of "balkanization" of banking is misdirected. Congress in the Douglas Amendment—not Massachusetts or Connecticut—divided the nation's banking system along state lines. The Massachusetts and Connecticut Acts merely exercise the authority conferred by the Douglas Amendment to remove the federal barrier to the degree that those states deemed desirable.

2. Petitioners contend that Congress, in enacting the Douglas Amendment, was not concerned "with any state action" that might be taken to remove the federal prohibition on interstate bank acquisitions (Pet. 17). However, the language and the legislative history of the Amendment provide clear proof that Congress did not intend to limit the states' policy choices in deciding whether, or to what extent, to remove the federal barrier.

In presenting his Amendment to the Senate, Senator Douglas carefully explained that, although no state at that time authorized interstate bank acquisitions, his "amendment would leave the way open for states to make explicit provision for such purchases and acquisitions if they wished to do so."[28] Accordingly, the Amendment expressly provided that the Federal Reserve Board could approve a bank holding company's application to acquire a bank located in another state only if such an acquisition "is specifically authorized by the statute laws of the state in which [the banking organization to be acquired] is located, by language to that effect and not merely by implication."[29]

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27 102 Cong. Rec. 6860 (1956); *accord id.* at 6861 (remarks of Sen. Bricker); *id.* at 6860 (remarks of Senator Bennett).

28 102 Cong. Rec. 6860 (1956); *accord id.* (remarks of Senator Bennett).

29 12 U.S.C. § 1842(d)(1).

Senator Douglas repeatedly analogized his Amendment to the McFadden Act. That federal statute, enacted in 1927 and amended in 1933, provides that a national bank may establish and operate branches within the state in which it is situated at any point outside of the limits of the city, town or village in which it is situated

> if such establishment and operation are at the time *authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication* or recognition, and subject to the restrictions as to location imposed by the laws of the State on State banks.[30]

Senator Douglas explained on the Senate floor that:

> [B]y the McFadden Act and other measures, national banks have been permitted to open branches *only to the degree permitted by State laws* and State authorities.
>
> * * *
>
> [W]hat our Amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act—namely, our Amendment will permit out-of-State holding companies to acquire banks in other States *only to the degree that State laws expressly permit them*; and that is the provision of the McFadden Act.
>
> * * *
>
> [M]y Amendment is in principle almost identical with the present provision which governs branch banking.[31]

Thus, the Douglas Amendment, like the McFadden Act, reflects a Congressional judgment that, for purposes of banking, the model of a single national economic unit would *not* best serve the national interest. Rather, in the Douglas Amend-

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30 12 U.S.C. § 36(c) (emphasis added).

31 102 Cong. Rec. 6858, 6860 (1956) (emphasis added).

ment, state law was made controlling for federal purposes, as had long been true under the McFadden Act.[32] For this reason, Senator Douglas noted during the debates that his Amendment certainly should be supported by "[a]nyone who favors States rights."[33] Similarly, a co-sponsor of the Douglas Amendment stressed that "control of expansion of bank holding companies across State lines . . . is a matter of primary concern to State governments and is an area *best left to their discretion* . . . ."[34]

In sum, Congress clearly intended that each state's own policy should govern the extent to which, if at all, interstate bank acquisitions may occur within that state's borders, notwithstanding the obvious likelihood that disparate approaches would result.[35] Petitioners' complaint that the Massachusetts and Connecticut Acts prevent "a uniform approach to interstate bank acquisitions" simply ignores Congress' judgment that the states should make their own policy determinations concerning the federal barrier.[36]

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32 *See First Union Bank & Trust Co.* v. *Heimann*, 600 F.2d 91, 99 (7th Cir. 1979); *Hempstead Bank* v. *Smith*, 540 F.2d 57, 59 (2d Cir. 1976).

33 102 Cong. Rec. 6860 (1956).

34 102 Cong. Rec. 6862 (prepared statement of Senator Payne) (emphasis added).

35 This is hardly—as petitioners imply (Pet. 22 & n.31)—a situation in which Congress' intent is sought to be derived from "isolated fragments of legislative history." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 342 (1982) (emphasis added) (reliance "on a *single* statement made on the floor of the House"). Rather, as partially set forth here, the Senate debate contains substantial and clear evidence of Congress' intent in the Douglas Amendment. This Court has long recognized the significance of such floor discussion, especially where, as here (see n.26, *supra*), the statutory material at issue was added by amendment on the floor and the relevant floor remarks are by the provision's sponsors. *See, e.g.*, *Lewis* v. *United States*, 455 U.S. 55, 63 (1980); *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

36 There is no authority for petitioners' veiled suggestion that Congress actually intended to preclude the states from differentiating among out-of-state bank holding companies by state of origin in exercising the powers conferred upon them by the Douglas Amendment (Pet. 17-18). Petitioners rely (Pet. 18) upon a *June 1955 House* discussion of an earlier bank holding

II. All Prior Judicial And Administrative Precedents Interpreting The Douglas Amendment Recognize That Congress Authorized The States To Be Selective In Lifting The Federal Barrier To Interstate Bank Acquisitions.

The holdings below of the Federal Reserve Board and the Second Circuit—that the Douglas Amendment authorizes the states to be selective in determining the extent to which they lift the federal bar to expansion by out-of-state bank holding companies—are entirely consistent with *every* prior decision of the Board and those federal appellate courts that have considered the Douglas Amendment.

1. The Connecticut and Massachusetts Acts, like all but one of the total of 22 state statutes which have been enacted pursuant to the Douglas Amendment, lift the federal barrier to interstate bank acquisitions on a selective basis.[37] The Board, recognizing that this is precisely what Congress intended by the Douglas Amendment, has consistently approved acquisitions under such state statutes.

Until 1972 no state exercised the congressionally-conferred authority to enact legislation lifting the federal barrier. Then, Iowa enacted the first statute, which allowed the acquisition of Iowa banks only by the single out-of-state holding company that had owned banks in Iowa prior to January 1, 1971.[38] The

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company bill that did not contain the Douglas Amendment and that was *not* enacted. Such material plainly has no relevance for the proper interpretation of the Douglas Amendment, which was not added to the BHC Act until a year later on the *Senate* floor.

Petitioners also note that in 1955 the Senate Subcommittee on Banking heard testimony against an absolute ban in interstate banking and in favor of "a trade-area approach." *See Control of Bank Holding Companies, 1955: Hearings on S.880, S.2350 and H.R. 6227 before the Subcomm. of the Sen. Comm. on Banking and Currency*, 84th Cong., 1st Sess. 139-40 (1955). Based on this fact, petitioners argue that the passage of the Douglas Amendment proves that Congress rejected the idea of regional banking (Pet. 17 n.21). In fact, it proves precisely the opposite. Rather than adopting this less restrictive regional approach, Congress banned interstate banking entirely, and gave the states the power to lift the ban if and as they wished.

37 See pp. 4-6, *supra*.

38 Iowa Code Ann. § 524.1805 (West Supp. 1982-83).

Board, in approving additional acquisitions by that sole "grandfathered" institution, rejected the argument that "Congress did not intend to allow the state legislatures to *choose selectively* which out-of-state bank holding companies could enter the state."[39] To the contrary, the Board held that " 'State legislative judgments' " in the area of interstate bank acquisitions are determinative.[40]

Thereafter, the Board has repeatedly approved applications by out-of-state bank holding companies to acquire or establish in-state banks whose activities are limited by state law to a special purpose, such as the issuance of credit cards.[41] These limited purpose bank statutes contain restrictions which prevent banks owned by out-of-state holding companies from competing with local banks.[42]

Recently, the Board, whose interpretation of the BHC Act is entitled to substantial weight,[43] emphasized that, through the Douglas Amendment, Congress meant to "allow[ ] the states

39 *Northwest Bancorporation*, 28 Fed. Reg. 21530, 21531-32 (1973) (emphasis added), *aff'd, Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975).

40 28 Fed. Reg. at 21532. The Board has subsequently upheld other state statutes that effectively permit acquisitions by only grandfathered out-of-state bank holding companies. *NCNB Corp.*, 68 Fed. Res. Bull. 54 (1982) (Florida statute that permits only three out-of-state bank holding companies to acquire additional Florida banks); *General Bancshares Corp.*, 69 Fed. Res. Bull. 802 (1983) (Illinois statute effectively allowing acquisitions by only a single Missouri-based bank holding company).

41 *Citicorp*, 70 Fed. Res. Bull. 431 (1984) (Maryland statute); *Citicorp*, 68 Fed. Res. Bull. 499 (1982) (Delaware statute); *Provident National Corp.*, 68 Fed. Res. Bull. 194 (1982) (Delaware statute); *Citicorp*, 67 Fed. Res. Bull. 181 (1981) (South Dakota statute). Also see p. 5 & n.15, *supra*.

42 For example, Delaware law prescribes that an out-of-state holding company may control a Delaware bank only if the bank (1) is "operated in a manner and at a location that is not likely to attract customers from the general public," (2) operates "no more than a single office located in the state," and (3) has a minimum of $25 million in capital and surplus and employs "not less than 100 persons" in the State within one year after commencing business. Del. Code Ann. tit. 5, § 803 (Supp. 1982).

43 *E.g.*, *Securities Industry Ass'n* v. *Board of Governors*, 52 U.S.L.W. 4962, 4964 (U.S. June 28, 1984); *United States* v. *Nat'l Ass'n of Securities Dealers*, 422 U.S. 694, 719 (1975).

to apply their own policies regarding interstate banking to the acquisition by out-of-state bank holding companies of banks located within the borders of a state."[44] Explaining that it has "*consistently* construed the Douglas Amendment to authorize the states to limit or to restrict entry by out-of-state bank holding companies," the Board recognized that it has "approved a number of applications under statutes that admit only certain bank holding companies or that admit bank holding companies only under certain circumstances and that exclude all others."[45]

In considering the present transactions, the Board stated that "[n]othing in the history of the Douglas Amendment suggests that the states were to be permitted only to choose between not allowing out-of-state bank holding companies to enter, and allowing completely free entry."[46] In light of the deference due to this longstanding and plainly reasonable interpretation of the Douglas Amendment, further judicial review is unwarranted.

2. Petitioners wholly disregard the fact that the federal appellate court decisions which construe the Douglas Amendment uniformly give the Amendment the same interpretation as the Board and the court below.

In *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), the District of Columbia Circuit sustained the Board's approval of the interstate acquisitions under the Iowa statute described

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44 *Bank of New York Co.*, 70 Fed. Res. Bull. 527, 528 (1984); *accord First Bank System, Inc.*, 70 Fed. Res. Bull. ____, ____, (September 21, 1984) ("the purposes and legislative history of the Douglas Amendment . . . reflect an intent to preserve the authority of states over the structure of banking within their borders").

45 *Bank of New York Co.*, 70 Fed. Res. Bull. at 528 (emphasis added).

46 (Pet. App. A71). Both before the Board and the Second Circuit below, petitioners argued that the Douglas Amendment requires a state to choose between permitting *all* out-of-state bank holding companies to acquire banks within its borders or permitting no interstate acquisitions (Pet. App. A29, A71). This argument having proved unavailing, petitioners have shifted ground before this Court.

above (at p. 15 & n.38). In upholding the Iowa statute against a constitutional challenge, the Court of Appeals rejected the contention that Congress had restricted the states' authority under the Douglas Amendment so that they could only "extend the right to acquire in-state banks to all out-of-state bank holding companies or . . . prohibit such acquisitions entirely."[47] The District of Columbia Circuit held that neither the language nor the legislative history of the Amendment supported such a restrictive construction. The Court of Appeals in that case—like the Second Circuit below—held that Congress had anticipated "that states might be *selective* in allowing bank holding companies to cross state lines," and considered it "*obvious*" from the legislative history that the Amendment's purpose "was to assure that the states had sufficient power to control the expansion of bank holding companies across state lines so that such expansion *would not contravene state policy*."[48] Thus, the District of Columbia Circuit in *Iowa Independent Bankers* held that state statutes enacted under the Douglas Amendment which permit only certain interstate bank acquisitions will withstand judicial scrutiny.

Last year, in *Conference of State Bank Supervisors* v. *Conover*, 715 F.2d 604, 613 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1708 (1984), the District of Columbia Circuit reaffirmed its interpretation of the Douglas Amendment in *Iowa Independent Bankers*, stating "that the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter."[49] The District of Columbia Circuit thereby recognized—as it had in *Iowa Independent Bankers*—that Congress intended the states to construct their own answers to the policy questions raised by interstate bank acquisitions, and for those answers to be paramount.

The Board's long-standing view that Congress expressly authorized the states to lift the federal interstate prohibition in

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47 511 F.2d at 1296.

48 *Id.* at 1296, 1297 (emphasis added).

49 715 F.2d at 613.

accord with their own particular policies is entirely consistent with this Court's discussion of the Douglas Amendment in *Lewis* v. *BT Investment Managers, Inc.* There, the Court recognized that the Douglas Amendment conferred upon the states the authority "*to create exceptions* to th[e] general prohibition, that is, *to permit* expansion of banking across state lines where it otherwise would be federally prohibited."[50] Massachusetts and Connecticut have simply exercised this authority to *create exceptions* to the federal bar by *permitting* interstate transactions that otherwise would be federally proscribed. Under these circumstances, no serious constitutional challenges to Massachusetts and Connecticut Acts can be maintained.

III. There Is No Conflict With This Court's Prior Commerce Clause And Compact Clause Precedents.

Under this Court's established precedents, Congress' grant of authority to the states in the Douglas Amendment drains all substance from petitioners' claims under the Commerce and Compact Clauses. Because the Second Circuit so recognized, it disposed of petitioners' constitutional objections in short order. Its decision—which is entirely consistent with this Court's precedents—does not warrant review.

1. It is well settled that Congress may exercise its plenary power under the Commerce Clause by conferring upon the states a power to regulate interstate commerce that they would not otherwise enjoy.[51] Where Congress has done so, "any action taken by a state within the scope of the Congressional authority is rendered invulnerable to Commerce Clause challenge."[52] In such circumstances, the negative implications of the Commerce Clause—upon which petitioners base their

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50 447 U.S. at 47 (emphasis added in part). Also see n.61, *infra*.

51 *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. at 44; *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 434 (1946); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315 (1945).

52 *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981).

Commerce Clause challenge (Pet. 14, 21, 23)—do not apply to the states any more than they do to Congress itself.[53]

Last Term, the Court emphasized that "[t]here is no talismanic significance" to any particular test for determining when Congress has authorized the states to adopt legislation in a particular area that would otherwise offend the Commerce Clause. The essential concern simply is that Congress has "unmistakably" evidenced its intent to do so.[54]

By opting in the Douglas Amendment for potentially diverse state policy determinations as opposed to a uniform approach to interstate bank acquisitions, Congress made clear that the concept of a single national economic unit has no application in the area of interstate bank acquisitions.[55] To assert—as petitioners do—that the negative implications of the Commerce Clause continue to govern in these circumstances is to defy the will of Congress.[56]

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53 *Id.* at 652-53.

54 *South-Central Timber, Inc.* v. *Wunicke*, 52 U.S.L.W. 4631, 4633 (U.S. May 22, 1984).

55 See pp. 11-12, *supra*.

56 Petitioners imply (Pet. 6) that recent legislative proposals concerning regional interstate banking demonstrate that the Douglas Amendment does not provide sufficient authority for the state statutes at issue. No such inference is warranted. In reporting out the bill to which petitioners refer (which was overwhelmingly approved by the Senate but which was not acted upon by the House), the Senate Committee on Banking and Currency stated that it "believes that the state statutes concerning interstate banking [such as the Connecticut and Massachusetts Acts] are consistent with both the constitution and the federal banking statutes . . . ." S. Rep. No. 98-560, 98th Cong., 2d Sess. 49 (1984). During the Senate floor debate on the bill, Senator Garn, the sponsor of the legislation, stressed that this proposal was "merely a clarification of the powers that the States have always retained under the Douglas amendment," and Senator Tsongas asserted that "we do not intend to express or imply any disagreement with the Second Circuit's interpretation of the present Douglas amendment . . ." 130 Cong. Rec. 11153 (1984) (prepared statements); *accord id.* at 11154 (Remarks of Sen. Bentsen noting that many reciprocal interstate statutes were "tied up in court due to the opposition of large money center banks"). In any event, this Court has long recognized that unenacted legislative proposals do not provide a reliable guide to the meaning of an existing law enacted by a prior

Petitioners nonetheless claim that the Douglas Amendment does not authorize states to distinguish among out-of-state bank holding companies on the basis of state-of-origin. Petitioners thereby seek to limit Congress' authorization of state legislation in a manner which finds *no* support in either the language or the legislative history of the Douglas Amendment. As the Board and the courts have consistently ruled, the Douglas Amendment authorizes the states to be *selective* in permitting out-of-state bank holding companies to enter.[57]

This Court established in *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946), that where Congress exercises its plenary power under the Commerce Clause "by removing obstacles to state action" that would otherwise exist, Congress thereby

> put[s] the full weight of its power behind existing and future state legislation to sustain it from attack under the commerce clause . . . , subject only to the exceptions *expressly* provided for.

328 U.S. at 430-31 (emphasis added). The Massachusetts and Connecticut Acts are unquestionably within the literal terms of the Douglas Amendment's authorization of state legislation in that Massachusetts and Connecticut have "specifically authorized" interstate bank acquisitions "by the[ir] statute laws . . . by language to that effect and not merely by implication," 12 U.S.C. § 1842(d)(1). Under these circumstances, *Prudential Insurance Co.* v. *Benjamin* requires that petitioners, in order to prevail in their Commerce Clause challenge, must demonstrate that Congress, in the Douglas Amendment, "expressly provided for" specific "exceptions" to its general authorization and that the Massachusetts and Connecticut Acts are within such an express exception. Petitioners do not, and

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Congress. *E.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 332 n.24 (1981). Nor is congressional inaction on such a proposal significant, for Congress may well have concluded that the existing law is adequate and requires no revision. *See, e.g.*, *American Trucking Ass'ns* v. *Atchison, T.&S.F. Ry.*, 387 U.S. 397, 416-18 (1967).

57 See pp. 15-19, *supra*.

cannot, demonstrate the existence of any pertinent exception to the Douglas Amendment. They argue instead that the Massachusetts and Connecticut Acts are without the authorization of state legislation contained in the Douglas Amendment in that the Amendment makes no specific mention of state statutes which permit interstate bank acquisitions only by bank holding companies located in particular states (Pet. 19). It is too late in the day for petitioners to eliminate the requirement that "exceptions be *expressly* provided for" which the Court articulated over 38 years ago in *Prudential*.[58]

Following *Prudential*, this Court recently refused to impose a limitation on Congress' grant to the states of authority over interstate commerce in insurance similar to that suggested by petitioners in this case. In *Western & Southern Life Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 653 (1981), the Court—in rejecting the argument that the McCarran-Ferguson Act should be construed so as not to permit a retaliatory state tax that discriminated among out-of-state insurers—emphasized that it could find "no such limitation" on the states' power "in the language or the history of the Act." Since Congress had given the states authority to regulate interstate insurance activity without evidencing any intent to impose such a limitation, this Court refused to do so.

Quite properly, the court below followed the same course in rejecting petitioners' contention that the Douglas Amendment should be construed so as not to permit the states to distinguish among out-of-state bank holding companies (Pet. App. A29).

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58 *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-960 (1982), and *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 341 (1982), do not establish, as petitioners claim (Pet. 22), that Congress must expressly authorize the precise form of interference with interstate commerce caused by the challenged state action. Those decisions merely involved savings clauses that Congress had provided for *otherwise valid* state laws. The Douglas Amendment obviously cannot be viewed as a mere state law savings clause; among other things, such a savings clause is expressly set forth in a separate provision of the BHC Act, 12 U.S.C. § 1846. Nor would it make sense for this Court to impose a requirement of minute specificity for Congressional authorizations of state legislation. Such a requirement would serve only to frustrate legitimate Congressional efforts to remove state action from the reach of the Commerce Clause.

As in the McCarran-Ferguson Act, Congress in the Douglas Amendment imposed no limitation on the authority it conferred upon the states to alter the federal barrier to interstate bank acquisitions.[59]

This case in fact presents even less of a Commerce Clause issue than any of the Court's prior decisions sustaining state legislation enacted pursuant to Congressionally conferred authority. As the Second Circuit recognized below (Pet. App. 29), the Connecticut and Massachusetts Acts do not restrain interstate commerce; they promote it. Petitioners' arguments to the contrary notwithstanding (Pet. 23), the inescapable fact is that the Massachusetts and Connecticut Acts *permit* interstate acquisitions—such as the three transactions approved below by the Board—that otherwise would be *prohibited* by federal law. If the Acts were struck down, the Douglas Amendment's prohibition would be restored in full and *no* interstate acquisitions of Connecticut and Massachusetts banks could occur.[60]

Thus, in the context of this case, *federal* law in the form of the Douglas Amendment—not the state statutes at issue—restricts interstate commerce. All Massachusetts and Connecticut have done is exercise the authority—"to *create exceptions* to th[e] general prohibition" on interstate bank acquisitions—that this Court stated in *Lewis* v. *BT Investment Managers, Inc.*, was conferred upon the states by the Douglas Amendment.[61] For

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59 Like the Second Circuit below, the District of Columbia Circuit—the only other circuit to have considered the question—has held that the Douglas Amendment does not contain any explicit or implicit limitation or restriction on a state's power to alter the federally-imposed barrier to interstate bank acquisitions. *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d at 1296-97. The case is discussed in further detail at pp. 17-18, *supra*.

60 This Court has never held that it is a Commerce Clause violation to *promote* interstate commerce that otherwise would not exist at all. The *South-Central Timber* decision, upon which petitioners rely (Pet. 23), involved an in-state processing requirement that clearly *restricted* interstate commerce. 52 U.S.L.W. at 4631-32.

61 447 U.S. at 47. The Connecticut and Massachusetts Acts clearly impose no "restrictions" on bank holding company activities beyond those imposed under federal law by the Douglas Amendment, and thus are in no

this reason, the Second Circuit below held "that the Massachusetts and Connecticut statutes do not violate the Commerce Clause" in that "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31). Because that decision was entirely consistent with *Lewis* and this Court's other Commerce Clause precedents, there is no need for review by this Court.

2. There is, if anything, even less justification for review of petitioners' Compact Clause claim. Applying this Court's established precedents, the Second Circuit below observed that, even if the Connecticut and Massachusetts Acts were "treated as a compact," the arrangement "would *only* violate the Compact Clause if it were a 'combination tending to the increase of *political power* in the States, which may encroach upon or interfere with the supremacy of the United States.' "[62] Petitioners do not dispute the standard applied by the Second Circuit; rather, they attack its conclusion that the Massachusetts and Connecticut Acts do *not* "in any way increase the *political power* of the New England states or encroach upon or interfere with the just supremacy of the United States."[63]

Petitioners contend that the challenged statutes increase the political power of the New England states in a manner inconsistent with federal supremacy in that they *omit to permit* non-New England-based bank holding companies to acquire

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way at odds with this Court's further observation in *Lewis* that "it is doubtful" that the Douglas Amendment "authorizes state *restrictions* of any nature on bank holding company activities." *Id.* (emphasis added). In any event, as the opinion makes clear, the Court was referring to restrictions on holding company activities permitted under Section 4(c)(8) of the BHC Act, 12 U.S.C. § 1843(c)(8), which relates only to *non-banking* activities, such as the trust advisory services at issue in *Lewis*. The Court clearly was not speaking to holding company acquisitions of *banks*, which are regulated under Section 3 of the BHC Act, 12 U.S.C. § 1842.

62 (Pet. App. A32) (emphasis added) (*quoting* and *citing United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976); *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893)).

63 (Pet. App. A32 (emphasis added)).

Massachusetts and Connecticut banks (Pet. 25-26). Nowhere have petitioners provided the slightest indication of just how the alleged compact increases the power of Massachusetts and Connecticut. Although the challenged statutes purportedly injure petitioners by not allowing non-New England bank holding companies to acquire Connecticut and Massachusetts banks, injury to *private parties* is hardly the same thing for purposes of the Compact Clause as injury to *states*. In any event, it is the pre-existing federally-imposed barrier of the Douglas Amendment—and not the challenged statutes—that prevents entry into Massachusetts and Connecticut by non-New England bank holding companies.

In claiming further that the challenged statutes "cause interstate divisiveness and antagonism" (Pet. 25), petitioners ignore the federal statutory context within which the Connecticut and Massachusetts Acts were enacted. The Acts have neither divided the states one from the other, nor have they "prevent[ed] a uniform approach to interstate banking" (Pet. 25). That was done by Congress in the Douglas Amendment. No decision of this Court has ever held that state action—occurring in an area where Congress unmistakeably made potentially disparate state policy determinations paramount—violates the Compact Clause.[64]

Petitioners make the sweeping claim (Pet. 27) that the Massachusetts and Connecticut Acts interfere with federal supremacy by "creating a new level of regulation . . . not provided for by the Congress in its regulation of interstate banking." This claim is demonstrably inaccurate. Neither Act creates any new regional or multi-state regulatory authority. Each state continues to regulate acquisitions of in-state banks

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64 Insofar as petitioners claim that the Massachusetts and Connecticut Acts cause economic injury to states outside New England (Pet. 26), this Court has previously established that, unless such injury "transgresses the bounds of the Commerce Clause," the federal structure, with which the Compact Clause is exclusively concerned, is not implicated. *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. at 478. Because the challenged statutes plainly do not offend the Commerce Clause (see pp. 19-24, *supra*), under *United States Steel* they also do not violate the Compact Clause.

(and the bank holding companies which own them) using its own pre-existing regulatory framework and its own banking regulatory officials.

Petitioners also claim that the Massachusetts and Connecticut Acts create an "interstate banking system" that somehow "impair[s]" the federal government's "paramount interest in regulating the interstate expansion of bank holding companies" (Pet. 28). It does not. Congress by the Douglas Amendment has exercised its plenary power to regulate interstate commerce in bank acquisitions by authorizing the states to determine whether, and to what degree, to permit interstate bank acquisitions. By exercising this federally-granted authority, Connecticut and Massachusetts cannot reasonably be said to impair the interest of the federal government in the regulation of interstate bank acquisitions.[65]

Congress, when it adopted the Douglas Amendment, rejected the Senate Banking and Currency Committee version of the BHC Act which would have allowed the Federal Reserve Board, rather than the states, to determine the degree to which interstate bank acquisitions would occur. For this reason, the

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65 The only federal interest in regulating bank acquisitions is spelled out in Section 3 of the BHC Act, 12 U.S.C. § 1842. That provision requires the Board, before approving a bank acquisition, to consider whether the acquisition will decrease competition and increase concentration, whether the acquiring company has the financial and managerial resources to make the acquisition a success and whether the acquisition will meet the needs of the communities to be served. 12 U.S.C. § 1842(c). Because the BHC Act requires Board approval of *all* bank acquisitions—whether *intrastate* or *interstate*—these bedrock federal interests cannot be encroached upon by any state statute enacted under the Douglas Amendment.

Petitioners further claim (Pet. 27 n.43, 28) that the Acts collide with a failing bank provision of federal law, 12 U.S.C. § 1823(f), added by the Garn-St Germain Depository Institutions Act of 1982 (the "Garn-St Germain Act"). No such clash can occur. The provisions of the Garn-St Germain Act control, by their express terms, "[n]otwithstanding [the Douglas Amendment] or any other provision of law, State or Federal . . . ." 12 U.S.C. § 1823(f)(4)(i). Under this unequivocal assertion of federal supremacy, the Massachusetts and Connecticut Acts would be pre-empted by federal law where they would otherwise conflict with the Garn-St Germain Act. *See Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 152-53 (1982).

Board correctly found below that the Douglas Amendment should be read as a Congressional "renunciation of the federal interest in" determining the degree to which interstate bank acquisitions may occur. Once the Douglas Amendment is properly understood, no reasonable claim of encroachment upon federal supremacy may be maintained—as the Second Circuit found below (Pet. App. A32). Because the Court of Appeals' decision in no way conflicts with this Court's prior Compact Clause precedents, there is no reason for review by this Court.[66]

3. In the final analysis, petitioners' arguments against the Massachusetts and Connecticut Acts are premised on the notion that federal and state barriers to full interstate banking should be removed. The *policy questions* petitioners raise have already been resolved by Congress; they are not *legal issues* to be decided by the Court. Under Article I of the Constitution, Congress' judgment in the Douglas Amendment—that the national interest is best served by permitting the states to determine for themselves the degree to which interstate bank acquisitions should be permitted—is determinative. When petitioners' rhetoric about national economic and political unity is stripped away, it is clear that petitioners ask the Court to review and overturn state statutes—in an area where Congress has explicitly authorized potentially disparate state policy determinations—simply because those state statutes, and the congressional authorization pursuant to which they were enacted, conflict with petitioners' desires. Accordingly, petitioners have failed to establish any entitlement to review by this Court.

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66 Petitioners' claim that the Connecticut and Massachusetts Acts are particularly "objectionable" because they supposedly reflect "concerted conduct" by a "group of states" (Pet. 21) is entirely beside the point. Although the Douglas Amendment unquestionably uses the singular tense in describing state legislative enactments (Pet. 15), nothing in the Amendment's language precludes a state from acting with other states, if it chooses, in lifting the federal prohibition. Petitioners do not, and cannot, point to anything in the Amendment's legislative history indicating an intent to restrict the states' authority in this regard.

CONCLUSION

For the reasons set forth above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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APPENDIX

Rule 28.1 Statement of Respondents CBT Corporation, Bank of New England Corporation and Hartford National Corporation

CBT Corporation, Bank of New England Corporation and Hartford National Corporation each have no parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.